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15 BASSAN-ESKENAZI, FREDERICK A. BALL,
16 RAN OZ, LLOYD CARNEY, DEAN
17 GILBERT, KENNETH A. GOLDMAN, GAL
18 ISRAELY, BRUCE I. SACHS, ROBERT J.
19 SACHS and GEOFFREY Y. YANG

20 UNITED STATES DISTRICT COURT
21
22 NORTHERN DISTRICT OF CALIFORNIA
23
24 OAKLAND DIVISION

25 BIKASH MOHAN MOHANTY, On Behalf of)
26 Himself and All Others Similarly Situated,)

27 Plaintiff,)

28 v.)

29 BIGBAND NETWORKS, INC., AMIR)
30 BASSAN-EZKENAZI, RAN OZ, FREDERICK)
31 BALL, GAL ISRAELY, DEAN GILBERT,)
32 KEN GOLDMAN, LLOYD CARNEY, BRUCE)
33 SACHS, ROBERT SACHS, GEOFFREY)
34 YANG, MORGAN STANLEY & CO., INC.,)
35 MERRILL LYNCH, PIERCE, FENNER &)
36 SMITH, INC., JEFFERIES & CO., INC.,)
37 COWEN AND CO., INC., AND)
38 THINKEQUITY PARTNERS LLC)

39 Defendants.)

Case No. 4:07-CV-05101-SBA

BIGBAND DEFENDANTS'
RESPONSE TO MOTIONS FOR
CONSOLIDATION,
APPOINTMENT AS LEAD
PLAINTIFF, AND APPROVAL OF
SELECTION OF LEAD COUNSEL

Date: February 5, 2008

Time: 1:00 P.M.

Dept: Courtroom 3, 3rd Floor

Honorable Sandra B. Armstrong

1 DENNIS KOESTERER, On Behalf of Himself) Case No. 3:07-CV-05168-MMC
 and All Others Similarly Situated,)
 2)
 Plaintiff,)
 3)
 v.)
 4)
 BIGBAND NETWORKS, INC., AMIR)
 5 BASSAN-EZKENAZI, FREDERICK A. BALL,)
 RAN OZ, LLOYD CARNEY, DEAN)
 6 GILBERT, KEN GOLDMAN, GAL ISRAELY,)
 BRUCH SACHS, ROBERT SACHS, and)
 7 GEOFFREY YANG)
 Defendants.)

9 ABRENA WINSTON, Individually and On) Case No. 3:07-CV-05327-JSW
 Behalf of All Others Similarly Situated,)
 10)
 Plaintiff,)
 11)
 v.)
 12)
 BIGBAND NETWORKS, INC., AMIR)
 13 BASSAN-EZKENAZI, RAN OZ,)
 FREDERICK BALL, GAL ISRAELY, DEAN)
 14 GILBERT, KEN GOLDMAN, LLOYD)
 CARNEY, BRUCE SACHS, ROBERT)
 15 SACHS, GEOFFREY YANG, MERRILL)
 LYNCH, PIERCE, FENNER & SMITH, INC.,)
 16 MORGAN STANLEY & CO., INC., COWEN)
 AND CO., JEFFERIES & CO., and)
 17 THINKEQUITY PARTNERS LLC)
 Defendants.)

19 DONALD SMITH, On Behalf of Himself and) Case No. 3:07-CV-05361-SI
 All Others Similarly Situated,)
 20)
 Plaintiff,)
 21)
 v.)
 22)
 BIGBAND NETWORKS, INC., AMIR)
 23 BASSAN-EZKENAZI, and FREDERICK A.)
 BALL)
 24)
 Defendants.)

26
 27
 28

1 WAYNE LUZON, On Behalf of Himself and All)
 Others Similarly Situated,)
 2)
 Plaintiff,)
 3)
 v.)
 4)
 BIGBAND NETWORKS, INC., AMIR BASSAN-)
 5 EZKENAZI, RAN OZ, FREDERICK BALL, GAL)
 ISRAELY, DEAN GILBERT, KEN GOLDMAN,)
 6 LLOYD CARNEY, BRUCE SACHS, ROBERT)
 SACHS, GEOFFREY YANG, MORGAN)
 7 STANLEY & CO., INC., MERRILL LYNCH,)
 PIERCE, FENNER & SMITH, INC., JEFFERIES)
 8 & CO., INC., COWEN AND CO., INC., and)
 THINKEQUITY PARTNERS LLC)
 9)
 Defendants.)

Case No. 3:07-CV-05637-WHA

10 DEBRA L. BERNSTEIN, Individually and On)
 11 Behalf of All Others Similarly Situated,)
)
 12 Plaintiff,)
)
 13 v.)
)
 14 BIGBAND NETWORKS, INC., AMIR BASSAN-)
 EZKENAZI, RAN OZ, FREDERICK A. BALL,)
 15 GAL ISRAELY, DEAN GILBERT, KENNETH E.)
 GOLDMAN, LLOYD CARNEY, BRUCE I.)
 16 SACHS, ROBERT J. SACHS, GEOFFREY Y.)
 YANG, MORGAN STANLEY & CO.)
 17 INCORPORATED, JEFFERIES & COMPANY,)
 INC., MERRILL LYNCH, PIERCE, FENNER &)
 18 SMITH INCORPORATED, COWEN AND)
 COMPANY LLC, and THINKEQUITY)
 19 PARTNERS LLC,)
)
 20 Defendants.)

Case No. 3:07-CV-05819 CRB

21 EUGENE L. HAMMER, On Behalf of Himself)
 and All Others Similarly Situated,)
 22)
 Plaintiff,)
 23)
 v.)
 24)
 BIGBAND NETWORKS, INC., AMIR BASSAN-)
 25 EZKENAZI, RAN OZ, FREDERICK A. BALL,)
 RAN OZ, LLOYD CARNEY, DEAN GILBERT,)
 26 KEN GOLDMAN, GAL ISRAELY, BRUCE I.)
 SACHS, ROBERT J. SACHS and GEOFFREY Y.)
 27 YANG,)
)
 28 Defendants.)

Case No. 3:07-CV-5825-MHP

1 JAMES WILTJER, On Behalf of Himself and All) Case No. 3:08-CV-22-CRB
 2 Others Similarly Situated,)
 3)
 4 Plaintiff,)
 5 v.)
 6 BIGBAND NETWORKS, INC., AMIR)
 7 BASSAN-ESKENAZI, FREDERICK A. BALL,)
 8 RAN OZ, LLOYD CARNEY, DEAN GILBERT,)
 9 KENNETH A. GOLDMAN, GAL ISRAELY,)
 10 BRUCE I. SACHS, ROBERT J. SACHS,)
 11 GEOFFREY Y. YANG, MORGAN STANLEY)
 12 & CO. INCORPORATED, MERRILL LYNCH,)
 13 PIERCE, FENNER & SMITH)
 14 INCORPORATED, JEFFERIES & COMPANY,)
 15 INC., COWEN AND COMPANY, LLC,)
 16 THINKEQUITY PARTNERS LLC and DOES 1-)
 17 25, inclusive,)
 18 Defendants.)

13 The BigBand Defendants respond as follows to the (1) motion filed by Gwyn Jones for
 14 an order consolidating the above-captioned matters, appointing her as lead plaintiff, and
 15 approving her selection of co-lead counsel, and (2) the motion filed by the Sphera Fund for an
 16 order consolidating the above-captioned matters, appointing the Sphera Fund as lead plaintiff,
 17 and approving its selection of co-lead counsel.¹

18 I. INTRODUCTION

19 The above-captioned matters are putative securities fraud class action lawsuits alleging
 20 that the defendants made misrepresentations and/or omissions in connection with and following
 21 BigBand's initial public offering. The first action, *Mohanty v. Bassan-Eskanazi et al.*, No. C 07-
 22 5101-SBA (the "*Mohanty* Action"), was filed on October 3, 2007, and the other actions followed
 23 over the subsequent weeks.

24 On November 21, 2007, the parties to each of the then-pending lawsuits submitted a
 25 Stipulation and [Proposed] Order Regarding Consolidation and Scheduling in the first-filed
 26

27 ¹ The BigBand Defendants are BigBand Networks, Inc. ("BigBand"), Amir Bassan-
 28 Eskenazi, Ran Oz, Frederick Ball, Gal Israely, Dean Gilbert, Ken Goldman, Lloyd Carney,
 Bruce Sachs, Robert Sachs, and Geoffrey Yang.

1 *Mohanty* Action, in which they agreed that the cases should be deemed related and consolidated.
 2 *See Mohanty* Action, Docket No. 11.² The [Proposed] Order also provides that defendants need
 3 not respond to any complaint until the court-appointed lead plaintiff files a consolidated
 4 amended complaint.

5 On December 3, 2007, two alleged class members filed motions for appointment as lead
 6 plaintiff. Gwyn Jones filed a motion seeking consolidation of the actions, appointment as lead
 7 plaintiff, and approval of her selection of Hagens Berman Sobol Shapiro LLP and Kahn Gauthier
 8 Swick, LLC as co-lead counsel. Separately, the Sphera Fund filed a motion seeking
 9 consolidation of the actions, appointment of the Sphera Fund as lead plaintiff, and approval of
 10 the Sphera Fund's selection of Glancy Binkow & Goldberg LLP and The Law Office of Jacob
 11 Sabo as co-lead counsel. The motions are scheduled for hearing on February 5, 2008.

12 Also on December 3, 2007, the *Wiltjer* Action was filed in the Superior Court for the
 13 County of San Francisco. On January 2, 2008, all defendants jointly removed the *Wiltjer* Action
 14 to this Court and, the next day, the BigBand Defendants filed a Motion for Administrative Relief
 15 in the *Mohanty* action to consider whether the *Wiltjer* Action should be related to the *Mohanty*
 16 Action and the other earlier-filed actions. *Mohanty* Action, Docket No. 24.³

17 As explained below, the BigBand Defendants agree that these matters (including the
 18 *Wiltjer* Action) should be consolidated into the first-filed *Mohanty* Action pending before the
 19 Hon. Sandra B. Armstrong. The BigBand Defendants take no position, however, on the
 20 appropriateness of the moving parties or their counsel for the positions of lead plaintiff and lead
 21 counsel, respectively.

22
 23
 24
 25 ² As explained below, *Wiltjer v. BigBand Networks, Inc., et al.*, Case No. 08-22-CRB (the
 26 “*Wiltjer* Action”), was not filed until December 3, 2007 – the same day on which Ms. Jones and
 the Sphera Fund filed their competing motions for appointment as lead plaintiff.

27 ³ Defendants Morgan Stanley & Co. Incorporated, Merrill Lynch, Pierce, Fenner & Smith
 28 Incorporated, Jefferies & Company, Inc., Cowen and Company, LLC, and Thinkequity Partners
 joined in the BigBand Defendants' motion on January 3, 2008. *Mohanty* Action, Docket No. 25.

1 **II. THE BIGBAND DEFENDANTS' RESPONSE TO THE JONES AND SPHERA**
 2 **FUND MOTIONS**

3 **A. Consolidation**

4 The BigBand Defendants agree that the above-captioned matters should be consolidated
 5 into a single action before Judge Armstrong. The consolidation order should specifically include
 6 the *Wiltjer* action, which was filed (and removed to this Court) after Ms. Jones and the Sphera
 7 fund filed their competing motions for appointment as lead plaintiff, and any other substantially
 8 similar actions that may be filed later. *See, e.g., Mohanty* Action, Docket No. 11 at 1 (joint
 9 request among all parties that consolidation include subsequently-filed actions). The BigBand
 10 Defendants understand that the plaintiff in the *Wiltjer* Action intends to file a motion to remand
 11 the *Wiltjer* Action to state court.

12 **B. Lead Plaintiff**

13 The BigBand Defendants take no position regarding the appointment of either Gwyn
 14 Jones or the Sphera Fund as lead plaintiff for the consolidated action. However, in taking no
 15 position, the BigBand Defendants do not concede that these actions may properly be maintained
 16 as a class action, and do not waive their right to challenge the standing of the appointed lead
 17 plaintiff or the appointed lead plaintiff's ability to adequately represent the class. The BigBand
 18 Defendants can take discovery at the appropriate time regarding the appointed lead plaintiff's
 19 ability to adequately represent the Class. *See In re Chiron Corp. Sec. Litig.*, No. C-04-4293
 20 VRW, 2007 WL 4249902, at *13 (N.D. Cal. Nov. 30, 2007) ("The appointment of lead plaintiffs
 21 occurring as it does in advance of class discovery, is not a final ruling on their appropriateness as
 22 Class Representatives") (citation omitted); *In re Oxford Health Plans, Inc., Sec. Litig.*, 191
 23 F.R.D. 369, 373 (S.D.N.Y. 2000) (same); *Tanne v. Autobyte, Inc.*, 226 F.R.D. 659, 666 (C.D.
 24 Cal. 2005) ("Evidence regarding the requirements of Rule 23 will, of course, be heard in full at
 25 the class certification hearing. There is no need to require anything more than a preliminary
 26 showing at this stage") (quoting *Gluck v. CellStar Corp.*, 976 F. Supp. 542, 546 (N.D. Tex.
 27 1997)).
 28

1 **C. Lead Counsel**

2 The BigBand Defendants take no position regarding the approval of either Gwyn Jones’
3 or the Sphera Fund’s selection of co-lead counsel.

4 Dated: January 15, 2008

WILSON SONSINI GOODRICH & ROSATI
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